In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 55.

I. J. VAN HUFFEL,
Petitioner,

v.

TRACE D. HARKELRODE,
Treasurer of Trumbull County, Ohio,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OHIO.

REPLY BRIEF OF PETITIONER.

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Due to certain questions raised for the first time by respondent in his supplemental brief, counsel for petitioner file this their reply brief.

I.

A PLENARY SUIT WAS NOT NECESSARY OR REQUIRED.

It is claimed in the supplemental brief of respondent that the Bankruptcy Court never acquired jurisdiction over the person of the respondent, first, because there is no provision in the Bankruptcy Act providing for the mailing of notice respecting the filing of a petition for authority to sell real estate and marshal liens thereon, and second, be-

cause a proceeding to determine the priority of liens is a plenary proceeding. These questions are here raised for the first time and it is submitted that they are wholly without merit.

By Section 94, Title 11, U. S. C. (Section 58 of the Bankruptcy Act), creditors are entitled to ten days' notice by mail of all proposed sales of property, and it is claimed that this does not authorize a notice by mail of the filing of a petition for an order to sell, free and clear of liens, and to marshal the liens upon the property. The argument must fall of its own weight, for certainly a petition by a trustee for an order to sell is one to make "a proposed sale," and it is necessary for such petition to be complete that it ask for a sale either subject to incumbrances or free from incumbrances, and, if free from incumbrances, that the same be marshalled and their priority determined. Consequently, the fact that such petition asks for an order marshalling liens and authorizing the sale of the property free and clear of liens, in no wise detracts from the fact that the petition is one for "a proposed sale."

At the time the application was filed notice was given to all creditors of the hearing to be had upon such application (R. 20), and in addition thereto *lien claimants named as parties defendant* in such application were given a specific notice (R. 21), part of which read as follows:

> "Unless your interest is set up by proper pleading at or prior to said hearing, an order will be entered finding that you have no lien." (R. 22.)

Both of these notices were received by the respondent (R. 22) and in response thereto he mailed to the Referee a statement of the taxes due upon the real estate herein involved. He thus submitted himself to the jurisdiction of the court without objection. The fact that neither the respondent nor his counsel, the Prosecuting Attorney, ap-

peared at the hearing, paid no further attention to the proceedings, and had no actual knowledge of the findings of the Bankruptcy Court, determining the priority of liens, until some eight months afterward (R. 23), does not detract one iota from the fact that the respondent submitted himself to the jurisdiction of the court and that the court had jurisdiction to enter the order which it made.

The argument advanced that a proceeding to determine priority of liens is a plenary proceeding is equally groundless. The respondent never had possession of the real estate in question but, as found by the Court of Appeals (R. 19), the bankrupt was the owner and was in possession on the very day it was declared a bankrupt, and naturally the Trustee in Bankruptcy succeeded to the bankrupt's title and possession. That a plenary suit is not necessary where the Bankruptcy Court has possession of the *res* is well settled. In the case of *Taubel-Scott-Kitzmiller Co. v. Fox*, (1924) 264 U. S. 426, wherein the bankruptcy court, by summary process, attempted to dispossess a sheriff of the bankrupt's property, which the sheriff had seized under a writ of execution issued upon a judgment obtained within four months of bankruptcy, but at a time when the bankrupt was still solvent, Mr. Justice Brandeis said, on pages 433 and 434:

> "Wherever the bankruptcy court had possession, it could, under the Act of 1898, as originally enacted, and can now, determine in a summary proceeding controversies involving substantial adverse claims of title under subdivision e of §67, under subdivision b of §60, and under subdivision e of §70. But in no case where it lacked possession could the bankruptcy court, under the law as originally enacted, nor can it now (without consent) adjudicate in a summary proceeding the validity of a substantial adverse claim."

To the same effect see *First National Bank v. Chicago Title & Trust Co.*, (1905) 198 U. S. 280; *Whitney v. Wenman*, (1905) 198 U. S. 539.

The cases of *Ray v. Norseworthy*, 90 U. S. 128, and *Factors & Traders Insurance Co. v. Murphy*, 111 U. S. 738, and *In re Henderson*, 206 Fed. 139, are not authorities in favor of respondent's position that a proceeding to determine the priority of liens, where the bankruptcy court is in possession of the property is a plenary proceeding. These cases are merely to the effect that a lien claimant cannot be dispossessed of his lien without notice. In the case of *Ray v. Norseworthy, supra*, the court said:

> "Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance, but it is equally clear that in order that such a proceeding may be regular and valid the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts and circumstances which it is supposed justify the application, that the judge may decide whether or not the application shall be granted. Secured creditors in such a proceeding must have due opportunity to defend their interests and, consequently, must be properly notified and summoned to appear for that purpose. *Foster v. Ames*, 1 Low. 316; *Willard v. Brigham*, 25 La. Ann. 601.
>
> "None of these conditions were fulfilled in this case. Instead of that the State Court finds that the petitioner was never properly notified and that he was not made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage, and it was upon that ground that the State Court decided that his rights were unaffected by the proceedings."

In the case at bar the Court of Appeals in its Finding of Fact No. 4 (R. 20) specifically found that, upon the filing of the petition to sell, the Referee "in the manner

and form as provided by the Bankruptcy Laws of the United States mailed to all known creditors" notice of the filing thereof and of the date set for hearing the same. Further, that, upon the filing of such petition, the Referee "mailed to those named as claiming any lien upon the property" an additional notice, to which was appended the following:

> "Unless your interest is set up by proper pleading at or prior to said hearing an order will be entered finding that you have no lien." (R. 22.)

The Court of Appeals further found that the notices so mailed were received by the respondent, "who, upon receipt thereof, mailed to the Referee a statement of the taxes due." Thus, in the case at bar the state court expressly found that the respondent had been notified "in the manner and form as provided by the bankruptcy laws of the United States." It is thus apparent that the respondent had due opportunity to defend his interest, and that he failed so to do is no excuse for the situation in which he now finds himself. *In re De Angeles,* 36 Fed. 2d. 218 (C. C. A. 10th Circuit 1929).

Moreover, even though a proceeding to determine the priority of liens were to be classed as a plenary proceeding, respondent, having been notified of the summary proceedings taken and having filed in response to such notice his statement of taxes due without objecting to the character of the proceeding, cannot now be heard to complain that the proper procedure was not adopted. *In re Rockford Produce & Sales Co.,* 275 Fed. 811 (C. C. A. 7th Circuit 1921); *Board of Trade v. Johnson,* 283 Fed. 374 (C. C. A. 7th Circuit 1922); *In re Hollingsworth & Whitney Co.,* 242 Fed. 753 (C. C. A. 1st Circuit 1917).

It is further claimed on behalf of respondent that he is purely a ministerial officer of the State of Ohio and

that the State of Ohio cannot be sued except in cases specifically authorized by statute. While this is true, it is equally true that the respondent is the person charged by the laws of the State of Ohio with the collection of taxes due, he is authorized to sue and be sued; and in proceedings instituted for the collection of taxes it is not necessary that the State be made a party thereto but the State shall "be deemed a party through and represented by the County Treasurer." (See Statutes of the State of Ohio set forth in Appendix A hereof.)

A similar question was raised by the Collector of Internal Revenue in the case of *In re Anderson*, 279 Fed. 525, wherein it was contended that service of a show cause order upon the Collector of Internal Revenue was not the equivalent of service upon the United States. The court said:

> "We think the trustee properly initiated these proceedings by making the collector of internal revenue a party. The notice of lien against all the property and rights of property belonging to the bankrupt was filed in the office of the clerk on July 6, 1920, and was recorded. The claim of the United States thus became a public record of which the trustee had to take notice. Notice of hearing on the petition was given to the collector, so that the United States might have opportunity to establish its claim. The official charged with the duty of collecting taxes is the collector of internal revenue, and it was he who filed a claim. It is he who serves notices upon delinquents and receives all payments under Revised Statutes, §§3183, 3184 (Comp. St. §§5905, 5906), and it is he who distrains and sells upon the distress. Section 3187 (Comp. St. §5909). All the duties devolving in such proceeding are those of the collector of internal revenue. He is the proper person to be notified to be brought into court on a proceeding such as the one instituted below. The court granted 10 days after the

service of a copy of the order within which to move to dispute the merits of the finding of the referee below. This was not taken advantage of and the time has expired. We think the government cannot complain as to the exercise of discretion.

"The order below, barring the United States from participating in the estate, must be affirmed."

Respondent in the case at bar occupies identically the same position with relation to the State of Ohio as that occupied by the Collector of Internal Revenue in his relation to the United States. What is true of the Collector of Internal Revenue under such circumstances must be equally true of the respondent. Carrying it to the logical limit, the suggestion of counsel for respondent would seem to deny the right of the referee to call the taxing authorities into his court for any purpose. If this be true, by what process can the taxes be ordered paid and the estate closed?

The contention of the respondent that there is only one method authorized for attacking taxes in Ohio, and that that method is to be found in Section 12075 of the General Code of Ohio, is also erroneous. Section 12075 provides as follows:

"Common pleas and superior courts may enjoin the illegal levy or collection of taxes and assessments, and entertain actions to recover them back when collected, without regard to the amount thereof, but no recovery shall be had unless the action be brought within one year after the taxes or assessments are collected."

Petitioner could not file any suit to enjoin a levy of the taxes here involved for the reason that they had been levied in the years 1924, 1925, 1926 and 1927, prior to the bankruptcy proceedings of The Sterling-Knight Company and prior to the time that the petitioner acquired title to the premises in question. Petitioner was not entitled to

enjoin the collection of such taxes for the reason that the Treasurer had a perfect right to collect the same from the bankrupt estate of The Sterling-Knight Company. Petitioner's only remedy was to enjoin the respondent from asserting any lien upon the premises in question for taxes which he claimed to be due for the years 1924, 1925, 1926 and 1927, a remedy which is obtained through the filing of a suit to quiet title. Moreover, the Supreme Court of Ohio in the recent case of *Conn v. Jones,* 115 O. S. 186 (1926), found and determined that the remedy provided for in Section 12075 was not exclusive but was cumulative to other remedies provided for by law.

II.

PETITIONER IS AN INNOCENT HOLDER FOR VALUE.

In respondent's brief it is contended that the petitioner is not an innocent holder for value inasmuch as the taxes, the lien of which is here in dispute, remained unpaid on the tax duplicate of Trumbull County, which was a public record of which petitioner was bound to take notice. The record of the proceedings had in the bankruptcy of The Sterling-Knight Company in the District Court of the United States for the Northern District of Ohio, Eastern Division, was likewise a public record of which petitioner was bound to take notice. In the latter public record it was disclosed that the lien of the respondent for the taxes here in question had, by order of the Bankruptcy Court, been removed from the premises in question and transferred to the funds to be derived from the sale thereof. It was upon this public record that the petitioner relied in accepting a deed to the premises, subject to taxes only for the year 1928 and thereafter, and he did not choose to rely solely upon the warranty of his grantor.

On pages 8 and 9 of respondent's brief attention is called to the fact that the premises here in question sold

for less than the amount even of the first mortgage, to say nothing about taxes and other liens, and that out of the proceeds of the sale of the mortgaged property $19,171.46 was applied to the payment of the costs of administration, and it is stated that the practice in bankruptcy courts is, where real estate is of less value than the encumbrances, to abandon the property and that that is what should have been done in the instant case; that the costs of administration were paid and the proceeds of the sale of the mortgaged property were distributed long before the respondent "learned anything of the attempt to avoid the payment of the taxes due the State of Ohio." It seems that the inference respondent desires us to draw from this argument is that the mortgage holders attempted in some way to avoid the payment of the taxes here in question. No such argument or contention was made in the courts below, and should this Court feel that there is any merit in such contention the record can be diminuted to show that the same is wholly without merit, for the record below, based upon which the Court of Appeals of Trumbull County made its findings of fact, shows that The Union Trust Company, Trustee, first mortgagee, The Old Dominion Mortgage Company, second mortgagee, and The Second National Bank of Warren, pledgee of the mortgage of The Old Dominion Mortgage Company, all answered the Trustee's petition to sell, requesting in their answers that the property be abandoned for the reason that there was no equity therein for general creditors. Notwithstanding such answers and the position of the mortgagees therein taken, the Referee in Bankruptcy ordered the Trustee in Bankruptcy to sell the premises, free and clear of all encumbrances.

It is perfectly true that the purchase price of $75,000.00 was, at the bankruptcy sale, paid in first mortgage

bonds with no money changing hands, and that the expenses of such sale were paid out of the proceeds of the sale of mortgaged personal property belonging to the same lien claimants, from the sale of which was realized $96,527.30. Had the Referee in Bankruptcy found that the taxes were a first lien upon the property, or had his finding that they were a third lien been reversed upon petition to review, the first mortgagee, who bid the property in at bankruptcy sale, would have had to pay the amount of those taxes in cash. An order to that effect made by the Referee or the reviewing court would have been binding upon the purchaser-mortgagee. Moreover, this argument is one which might perhaps be made if this action were one between the mortgagees and the respondent. The action, however, is not one between the mortgagees and the respondent but is between the respondent and a purchaser from the mortgagee, who in purchasing relied upon an unreversed, unmodified judgment of the Bankruptcy Court in a proceeding to which respondent was a party, in which he appeared and set up his claim, and in which it was ordered that the lien which respondent now seeks to assert against the premises in question be transferred from such premises to the funds to be realized from the sale thereof, and of which funds there were ample if he had chosen to follow them.

III.

THE BANKRUPTCY COURT DID HAVE JURISDICTION TO TRANSFER THE LIEN OF THE STATE FOR TAXES FROM THE PROPERTY TO THE FUND TO BE DERIVED FROM THE SALE THEREOF.

In respondent's supplemental brief upon this point but one additional argument is advanced in favor of his position that the Bankruptcy Court did not have power to transfer his lien for taxes from the property to the fund to be derived from the sale thereof, and that is that the Bankruptcy Act in all of its provisions assumes to protect the taxes due the sovereign states and that these taxes are not affected by a discharge in bankruptcy. True it is that the Bankruptcy Act in all its provisions assumes to protect the taxes due to the sovereign states, but in the case at bar respondent did not see fit to avail himself of the provisions of the Bankruptcy Act enacted for the purpose of protecting the same. In other words, the Bankruptcy Court was not without jurisdiction. At most it committed an error in holding the lien of the respondent to be a third lien upon the premises in question. Such a finding could have been corrected under the provisions of the Bankruptcy Act, had respondent given any attention to the proceedings had before the Referee, of which he was notified and in which he appeared and set up his claim. Having contented himself merely with the filing of his claim and not having seen fit to pay any further attention to the proceedings, he most certainly is not now in a position to complain. While the obligation to pay taxes assessed upon real property may not be affected by a discharge in bankruptcy, there is nothing in the Bankruptcy Act which forbids the Bankruptcy Court, with all interested parties before it, from transferring the lien of such taxes from the property of the bankrupt to the fund to be derived from the sale of such property, thereby discharg-

ing the *property* from the lien thereof. That the Bankruptcy Court has such power seems clear from the statutes and authorities to which attention has heretofore been called.

Respectfully submitted,

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APPENDIX A.

The following Sections of the General Code of Ohio show that the respondent is the officer who by law is charged with the duty of collecting taxes, and that he can both sue and be sued:

"§2658. *Collection of overdue taxes by distress.* —When taxes are past due and unpaid, the county treasurer may distrain sufficient goods and chattels belonging to the person charged with such taxes, if found within the county, to pay the taxes so remaining due and the costs that have accrued. He shall immediately advertise in three public places in the township where the property was taken the time and the place it will be sold. If the taxes and costs accrued thereon are not paid before the day appointed for such sale, which shall be not less than ten days after the taking of the property, the treasurer shall sell it at public vendue or so much thereof as will pay such taxes and the costs."

"§2660. *Proceedings when unable to collect taxes by distress.*—If the county treasurer is unable to collect by distress taxes assessed upon a person or corporation or an executor, administrator, guardian, receiver, accounting officer, agent or factor, he shall apply to the clerk of the court of common pleas in his county at any time after his semi-annual settlement with the county auditor, and the clerk shall cause notice to be served upon such corporation, executor, administrator, guardian, receiver, accounting officer, agent or factor, requiring him forthwith to show cause why he should not pay such taxes. If he fails to show sufficient cause, the court at the term to which such notice is returnable shall enter a rule against him for such payment and the costs of the proceedings, which rule shall have the same force and effect as a judgment at law and shall be enforced by attachment or execution or such process as the court directs."

"§2667. *Action by treasurer for unpaid taxes or assessments.*—When taxes or assessments, charged

against lands or lots or parcels thereof upon the tax duplicate, authorized by law, or any part thereof, are not paid within the time prescribed by law, the county treasurer in addition to other remedies provided by law may, and when requested by the auditor of state, shall enforce the lien of such taxes and assessments, or either, and any penalty thereon, by civil action in his name as county treasurer, for the sale of such premises, in the court of common pleas of the county, without regard to the amount claimed, in the same way mortgage liens are enforced."

"§2669. *Petition and evidence.*—Having made the proper parties, it shall be sufficient for the treasurer to allege in his petition that the taxes and assessments, or either, are charged on the tax duplicate against such premises, the amount thereof, and are unpaid, and he shall not be required to set forth in the petition any other or further special matter relating thereto. On the trial a certified copy of the entry on the tax duplicate, shall be prima facie evidence of such allegations and of the validity of such taxes and assessments."

"§2670. *Judgment and decree.*—Judgment shall be rendered for such taxes and assessments, or any part thereof, as are found due and unpaid, and for penalty and costs, for the payment of which the court shall order such premises to be sold without appraisement. From the proceeds of the sale the costs shall be first paid, next the judgment for taxes and assessments, and the balance shall be distributed according to law. The owner or owners of such property shall not be entitled to any exemption against such judgment, nor shall any statute of limitations apply to such action. When the lands or lots stand charged on the tax duplicate as forfeited to the state, *it shall not be necessary to make the state a party, but it shall be deemed a party through and represented by the county treasurer.*" (Italics ours)

"§5674. *Collection of tax of transient trader.*—When the county auditor certifies to the county treasurer the amount of tax assessed upon a return made

by or for a transient trader, under chapter three of this title, the treasurer shall forthwith enter it upon the duplicate and notify such trader of the amount assessed. If he neglects or refuses to pay the amount within twenty-four hours after receiving such notice, the treasurer shall collect it by any process or proceeding authorized in a case of delinquent personal property tax."

"§5695. *Collection of taxes.*—The county treasurer shall forthwith *collect* the taxes and penalty on the duplicate *by any of the means provided by law*, and the funds so collected shall be distributed in proper proportions to the appropriate funds." (Italics ours)

"§5697. *How treasurer to collect delinquent personal tax.*—When personal taxes stand charged against a person, and are not paid within the time prescribed by law for the payment of such taxes, the treasurer of such county, in addition to any other remedy provided by law for the collection of personal taxes, shall enforce the collection thereof by a civil action in the name of such treasurer against such person for the recovery of such unpaid taxes. It shall be sufficient, having made proper parties to the suit, for the treasurer to allege in his bill of particulars or petition that the taxes stand charged upon the duplicate of the county against such person, that they are due and unpaid, and that such person is indebted in the amount appearing to be due on the duplicate, and the treasurer need not set forth any other or further special matter relating thereto. The tax duplicate shall be prima facie evidence on the trial of the action, of the amount and validity of the taxes appearing due and unpaid thereon, and of the non-payment thereof, without setting forth in his petition any other or further special matter relating thereto."

"§5700. *When county officer allowed counsel.*—When an action has been commenced against the county treasurer, county auditor, or other county officer, for performing or attempting to perform, a duty authorized or directed by statute for the collection of the

public revenue, such treasurer, auditor, or other officer, shall be allowed and paid out of the county treasury reasonable fees of counsel and other expenses for defending the action. The amount of damages and costs adjudged against him, with the fees, expenses, damages, and costs shall be apportioned ratably by the county auditor among all the parties entitled to share the revenue so collected, and be deducted by the auditor from the shares or portions of revenue at any time payable to each, including as one of the parties, the state itself, as well as the counties, townships, cities, villages, school districts, and organizations entitled thereto."

"§5701. *County solicitor to attend such suits.*—In each county in which there is a county solicitor, or a board of control having a solicitor, the county solicitor and the solicitor of such board shall take charge of and attend to all actions against any county officer in such county for performing, or attempting to perform, any of the duties authorized by law. Such officers shall not employ any other counsel to defend such action or suit."

Under this section in *Brewster v. Anderson*, 1 O. C. C. 268, it was held that appearance for officers in tax recovery may be entered by the County Solicitor.